Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

TIMOTHY B. HUFFMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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May 12, 2006

QUESTIONS PRESENTED

1. Whether Petitioner's conviction under Michigan's "open or indecent exposure" law for arranging for the transmission of a cable television program containing nudity deemed "offensive" violates the First Amendment?

2. Whether the Michigan Court of Appeals' unprecedented and unforeseeable application of a public indecency statute to Petitioner's televised nudity violates the fair warning requirement embodied in the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINIONS BELOW

The Michigan Supreme Court's order denying leave to appeal is reported at 708 N.W.2d 95. Pet. App. 1a. The opinion of the Michigan Court of Appeals affirming Petitioner's conviction is reported at 702 N.W.2d 621. Pet. App. 2a-18a. The Kent County Circuit Court's opinions affirming Petitioner's conviction and denying Petitioner's interlocutory appeal are unreported. Pet. App. 19a-60a. The trial court opinion denying Petitioner's motion to dismiss is unreported. Pet. App. 61a-71a.

JURISDICTION

The Michigan Court of Appeals entered its judgment on May 10, 2005. The Michigan Supreme Court denied a timely petition for leave to appeal on January 12, 2006, with two Justices dissenting. On March 29, 2006, Justice Stevens granted Petitioner's application for a 30-day extension of the time to file a petition for writ of certiorari. This Court's jurisdiction rests on 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves application of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and Michigan Penal Code § 335a. The pertinent provisions are reproduced at Pet. App. 72a-73a.

STATEMENT OF THE CASE

A. Petitioner's Television Program And Arrest

Petitioner Timothy Huffman was convicted under Michigan's public indecency statute for the broadcast of a television program over GRTV, a public access cable channel in Grand Rapids, Michigan. Pet. App. 4a. Petitioner's show, called "Tim's Area of Control," is regularly shown on GRTV. At issue here is the sixty-eighth episode shown on March 31, 2000, and April 7, 2000. Pet.

App. 3a. In accordance with GRTV rules restricting adult content to nighttime hours, Petitioner directed GRTV to show the program only after 10:00 p.m., and the episodes were televised between 10:30 p.m. and 11:00 p.m. *See* GRTV Application for Cablecast & Statement of Compliance for Episode 68 (Mar. 30, 2000), marked as People's Trial Ex. 1; *see also* Trial Tr. at 47-48; Pet. App. 3a. The half-hour episode featured a number of music and comedy acts, as well as a public service announcement. *See* Summary of "Episode 68" of "Tim's Zone of Control," Ex. B to Defendant-Appellant's Application For Leave to Appeal, Docket No. 252315 (Mich. Ct. App. filed Nov. 24, 2003). Petitioner's conviction stems from a three-minute segment near the end of the program. The segment, a short comedy skit, shows "a flaccid penis and testicles marked with facial features," playing the role of "Dick Smart," a comedian performing an act at a comedy club without much success. Pet. App. 3a. The "Dick Smart" character makes a series of comedic double entendres, noting for example that he had been in the Army prior to becoming a comedian but that he mostly "just hung around" instead of working. Pet. App. 3a & n.1. Although perhaps crass, the routine is not sexual – there is no hint of eroticism in either the images displayed or the accompanying monologue. It is simply a comedy act depicting the travails of a humanized set of genitals attempting, and failing at, stand-up comedy.

GRTV received a single complaint about Petitioner's program from an adult viewer who testified at trial that she "stopped for a second, just to make sure I was seeing what I was actually seeing, and I watched it for at least a minute." Trial Tr. at 24. There is no indication that any child ever viewed Petitioner's program, which was televised at 10:30 p.m. The Grand Rapids Police Department executed a search warrant on Petitioner's home, where they seized a tape containing the episode triggering the complaint. Pet. App.

4a.[1] Petitioner voluntarily submitted to arrest, and was charged with violation of Michigan's "open or indecent exposure" statute, providing that "[a]ny person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor . . . ." Mich. Comp. Laws § 750.335a (2000).

B. Proceedings Below

In the trial court Petitioner moved to dismiss the prosecution on the ground that he could not be held criminally liable under § 750.335a for broadcasting nudity on cable television. Pet. App. 20a. After the motion was denied, Petitioner filed an interlocutory appeal in the Circuit Court for Kent County, Michigan. Pet. App. 21a. That appeal was denied, and following a jury trial, Petitioner was convicted on January 7, 2003. Pet. App. 22a. Petitioner was sentenced to one day in jail, with credit for time served, and twelve months of probation. He was also fined $500 and ordered to pay an additional $525 in costs. Pet. App. 4a.

Petitioner appealed his conviction to the Circuit Court on the grounds that the indecent exposure statute does not apply to televised images and that if it does, the statute violates the First and Fourteenth Amendments. On November 3, 2003, the Circuit Court rejected Petitioner's constitutional claims and affirmed his conviction. Pet. App. 19a-50a.[2]

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[1] The first magistrate to consider the warrant request denied it, stating that while he understood that Petitioner had broadcast nude images over cable television, he was "not sure what the crime is" and that "I don't know if it's a criminal act. That's the problem I have." Denial of Search Warrant Before Magistrate Judge Fred D. Hartley, at 4-5 (Mich. Dist. Ct. April 28, 2000). The police then obtained a warrant from a different judge, based on a potential charge under the state's "open or indecent exposure" law. Search Warrant (Mich. Dist. Ct. issued April 28, 2000).

[2] The Circuit Court held as an initial matter that Petitioner was precluded by the "law of the case" doctrine from raising issues that had been

Petitioner subsequently appealed to the Michigan Court of Appeals, which affirmed his conviction in a written opinion issued May 10, 2005. Framing the question before it as "whether televising an image of a naked penis is an 'open or indecent exposure' under the language of the statute," the court answered in the affirmative. Pet. App. 5a. The court observed that previous cases defined "open exposure" as "'any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended.'" *Id.* (quoting *People v. Vronko*, 579 N.W.2d 138, 142 (Mich. Ct. App. 1998) (internal quotation omitted)). The Court of Appeals stated: "Similarly here, we conclude that the purposes of the indecent exposure statute are best fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure." Pet. App. 6a.

While conceding that "application of this statute or, indeed, any indecent exposure statute, to television or film images is unprecedented," the court stressed Petitioner's failure to identify any "authority holding that the language of this statute, or any similar statute, does not encompass televised images." Pet. App. 5a. According to the court, the "exposure" for which Petitioner was convicted occurred not when Petitioner made the film, but rather when Petitioner "arranged for the [film's] delivery to GRTV" for the purpose

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decided by the same court in Petitioner's earlier interlocutory appeal. The Circuit Court also addressed and disposed of Petitioner's constitutional claims on the merits, however. Before the Michigan Court of Appeals, the state conceded that the law of the case in the Circuit Court did not bar higher appellate courts from considering the merits of Petitioner's constitutional claims and reaching a different result. Plaintiff-Appellee's Brief in Opposition to Application for Leave to Appeal, Docket No. 252315, at 3 (Mich. Ct. App. filed Dec. 15, 2003). Thus, when the Court of Appeals granted leave to appeal, it addressed the merits of Petitioner's constitutional claims without reference to the law of the case in the Circuit Court.

of having it broadcast on cable television. Pet. App. 8a.[3] In the court's view, Petitioner "should have expected, or in fact did expect, that someone would observe the Dick Smart segment and be offended by it." Pet. App. 6a-7a. Although the court agreed that a televised image is "qualitatively different than a physical exposure," the court speculated that a televised image can be more "offensive and threatening" than nudity in a public square. Pet. App. 6a. Thus, the court saw "no reason to read into the statute a limitation that would prevent its application to [Petitioner's] televised and, therefore, powerfully effective exposure." Pet. App. 7a.

Turning to Petitioner's First Amendment claim, the court applied intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968), observing that this Court had twice applied *O'Brien* in what the Court of Appeals viewed as an indistinguishable context: nude dancing. Pet. App. 8a-9a (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *City of Erie v. Pap's AM*, 529 U.S. 277 (2000)). The court thus approached the case as one involving the regulation of conduct – even though the offense for which Petitioner was convicted was the transmission of a cable television program. The court rejected Petitioner's argument that his conviction should be reviewed under the stringent scrutiny applied to restrictions on cable programming in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Positing that "a majority of the Supreme Court" has held that public nudity statutes are to be evaluated categorically under the *O'Brien* framework, the court concluded that *Playboy* and *Denver Area*, "which involve content-specific restrictions on speech itself, are simply

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[3] The court acknowledged that when Petitioner made the film, "no one allegedly observed the taping or took offense because of it." Pet. App. 8a.

inapposite to the question presented in this appeal." Pet. App. 14a. The court also relied on *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978), for the proposition that broadcasting has "the most limited First Amendment protection," and held that *Pacifica* applied with full force to cable programming such as Petitioner's. Pet. App. 14a.

"[D]iscern[ing] no difference between the Indiana public nudity statute in *Barnes* and the Michigan indecent exposure statute at issue here," the Court of Appeals concluded that the State's interest in protecting "morals and public order" was within the constitutional power of the state, furthered substantial government interests unrelated to restrictions on freedom of expression, and restricted Petitioner's speech no more than was necessary in order to further those government interests. Pet. App. 10a-13a. The court rejected Petitioner's argument, based on *Pap's*, that no "secondary effects" justified application of Michigan's indecent exposure statute to Petitioner's cablecast. The court concluded that the State need not show "secondary effects" to justify a restriction on Petitioner's expression, reasoning that "promotion of public morality through the prohibition of indecent exposure is a sufficient governmental interest to satisfy the second part of the *O'Brien* test." Pet. App. 13a.

Having determined that Petitioner's conviction did not offend the First Amendment, the court also rejected Petitioner's due process argument that the indecent exposure statute failed to give him fair warning that his conduct was proscribed. Pet. App. 15a-16a. The court relied on its earlier reasoning that televised images fall within the scope of the indecent exposure statute, explaining that the terms of the statute are not limited to circumstances where the "exposing person and the victims subject to the exposure are physically in the same place." Pet. App. 16a. Having found that the Petitioner "intended to maximize the impact of his open or

indecent exposure by using the cable medium," the court saw "no reason to conclude that he was not fairly on notice that a criminal charge or conviction could result." *Id.*

Petitioner subsequently appealed to the Michigan Supreme Court, which denied review on January 12, 2006. Pet. App. 1a. Two justices would have granted review. *Id.*

REASONS FOR GRANTING THE WRIT

"This case may seem at first blush too inconsequential to find its way into [the Court's] books, but the issue it presents is of no small significance." *Cohen v. California*, 403 U.S. 15, 15 (1971). That Petitioner's program might be offensive to some does not make it any less deserving of First Amendment protection, or his conviction less worthy of this Court's review. If anything, the need for review is greater here. Even if Petitioner's cable segment was of questionable taste, the constitutional values at stake in this case are paramount. "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, [the] fundamental societal values [embodied in the First Amendment] are truly implicated." *Id.* at 25.

At bottom, the court below held that the creator of a cable program can be criminally punished under a public nudity law if a single viewer could find the transmission morally "offensive." That ultimate holding unquestionably clashes with our most basic First Amendment values. But while the result is clearly erroneous, the Michigan court's reasoning reflects confusion resulting from the intersection of multiple lines of this Court's precedents. Some of the steps in the state court's reasoning directly conflict with recent decisions of this Court. But other steps, although misguided, find at least superficial justification in some of this Court's cases. Thus, either summary reversal or plenary merits review under the First Amendment would be appropriate here. In

either event, however, this Court's intervention and guidance is urgently needed in light of the sweeping chilling effect of the criminal sanctions imposed in this case.

One important First Amendment question presented here arises from the Michigan Court of Appeals' unprecedented application of this Court's nude dancing decisions in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *City of Erie v. Pap's AM*, 529 U.S. 277 (2000), to the core First Amendment expression at issue in this case. Equating the visual *representation* of nudity in the cablecast here with the *physical* public nudity at issue in *Barnes* and *Pap's*, the state court held that Petitioner's cable program was conduct, not speech, and was therefore subject to review under the so-called *O'Brien* standard. The court also reasoned that *O'Brien* applies because Michigan's public nudity law is a content-neutral regulation on its face – even though here the law has been applied to criminalize pure speech merely because a single viewer found it "offensive." And in applying *O'Brien*, the Michigan court held that application of the law in this way could be justified on the ground that it maintains public "morality" by banning "offensive" depictions of nudity – despite the absence of "secondary effects." Under this chain of reasoning visual depictions of nudity are deprived of all First Amendment protection traditionally accorded by this Court, and instead may be criminalized solely because a viewer might be offended. Although that result is plainly wrong, it cannot be gainsaid that the lower court's reasoning finds some superficial foothold in the nude dancing decisions. Review by this Court is necessary to cabin those decisions and make clear that they cannot be transposed from physical nudity in public to visual representations of nudity like that involved here.

A second important First Amendment question presented is the proper level of scrutiny to be applied to allegedly

"indecent" or "offensive" cable programming. The Court has struggled with this question, at times likening televised cablecasts to broadcasts, and at other times noting important differences between the two media. Most recently, however, the Court unambiguously held that strict scrutiny applies to regulation of indecent cable programming. *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000). But the Michigan Court of Appeals refused to follow *Playboy*, holding instead that cable is subject to the lower level of First Amendment protection applied to broadcast television in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which upheld the FCC's authority to regulate the times during which indecent broadcasts could be aired in order to protect children. Further, the court below went far beyond *Pacifica* itself by upholding a *criminal* sanction for programming that was cablecast during the FCC's "safe-harbor" hours and was not shown to have been viewed by any child. The Michigan court's refusal to apply strict scrutiny reflects lingering uncertainty concerning the protection afforded cable programming in light of this Court's long struggle with the issue, and plenary review of this question would afford the Court an opportunity to provide much-needed additional guidance to the lower courts. In light of the direct conflict with *Playboy*, however, the needed guidance could also be provided by a per curiam opinion summarily reversing on this basis. In either event, the decision below cannot be allowed to stand.

The completely unprecedented nature of Petitioner's criminal prosecution means, of course, that there is no conflict among the lower courts in the precise circumstances here. But in light of the fundamental First Amendment values at stake, and the chilling effect of the sweeping reasoning in the decision below, immediate review by this Court is urgently needed. The standard of review applicable to laws that purport to criminalize cable programming is an

issue of broad importance. Even more critical is the criminalization of core First Amendment speech under the Court of Appeals' application of *O'Brien*. That reasoning would apply with equal force to every published visual depiction of nudity – *Schindler's List* being but one prominent example – whether on broadcast television, cable, movies, video, or even photographs. And since most or all jurisdictions have public nudity laws, this subversion of core First Amendment principles could have widespread application. Even in the absence of additional prosecutions, the decision below is certain to have a substantial chilling effect on protected expression containing depictions of nudity that some viewers could find offensive.

Alternatively, the Court should summarily reverse the decision below as directly contrary to the fair-warning requirement embodied in the Due Process Clause of the Fourteenth Amendment, which prohibits the States from imposing criminal sanctions for conduct that one could not reasonably understand to be proscribed. *E.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *United States v. Lanier*, 520 U.S. 259, 270-71 (1997) (to give fair warning, criminal proscription must be "clearly established"). The Michigan Court of Appeals violated this principle by applying a novel construction of Michigan's indecent exposure statute to conduct that neither the statute nor any prior judicial decision fairly disclosed to be within the statute's scope. No court in the country had ever applied an indecent exposure statute to televised nudity, and the Michigan courts had always interpreted that state's indecent exposure law to apply only to exposures occurring in a public place. Furthermore, this Court has repeatedly struck down restrictions on indecent cable television programming. No reasonable person could have foreseen that televised nudity would be criminalized under Michigan's indecent exposure statute. Petitioner's conviction must be reversed.

I. This Case Presents Critical Questions Concerning The Government's Authority To Criminalize Images Of Nudity On Cable Television.

Michigan's unprecedented application of its "open or indecent exposure" law to cable television content raises a substantial question of First Amendment law: whether, by equating transmission of cable programming with physically appearing in a public square, a State can evade the scrutiny imposed by this Court's precedents on the regulation of indecent cable television content. If the Michigan court's reasoning were accepted, the careful balance this Court has struck in its media content cases would mean very little, and an entire category of expression – programs containing nudity – would be subject to criminal sanctions whenever someone finds them "offensive."

A. This Court Should Clarify That The *O'Brien* Rationale Cannot Be Applied To Representations Of Nudity That Are Merely "Offensive."

The Court has consistently held that the "indecent" or "offensive" nature of speech does not remove it from the protection of the First Amendment. "'Sexual expression which is indecent but not obscene is protected by the First Amendment.'" *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)); *see also Playboy*, 529 U.S. at 811-12 (sexually explicit cable programming "is protected speech"). Where obscenity is not involved, the fact that speech may be offensive to some does not justify its suppression. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977); *see also Cohen*, 403 U.S. at 22-23; *Pacifica*, 438 U.S. at 745.[4]

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[4] The State of Michigan has never contended that Petitioners' program was obscene and the State made no attempt to prosecute Petitioner pursuant to Michigan's obscenity statute, Mich. Comp. Laws § 752.365.

In this case, however, the Michigan Court of Appeals held that Petitioner could be criminally punished for an "offensive" cable transmission on the ground that Petitioner was convicted for "conduct" rather than speech. Pet. App. 6a-7a, 13a-14a. The Court of Appeals analyzed Petitioner's conviction under this Court's line of decisions governing situations where the enforcement of a rule unrelated to expression has the incidental effect of preventing a person from engaging in behavior which is not inherently expressive, but which the person may intend as expressive in specific contexts. *See O'Brien*, 391 U.S. 367 (general rule barring destruction of draft cards applied to burning of draft card as symbolic protest); *Barnes*, 501 U.S. 560 (general rule barring public nudity applied to dancing in the nude to enhance erotic message of dance); *Pap's*, 529 U.S. 277 (same).

The Michigan court's rationale that nudity in a cable program can somehow be separated from the "content" of that speech is fundamentally at odds with basic First Amendment principles. The court's approach, although erroneous, finds superficial justification in statements in *Barnes* and *Pap's* concerning the application of a generally applicable public nudity statute to nude dancing. This Court has struggled with how to characterize nude dancing for First Amendment purposes, and no position has garnered a clear majority. The Court should grant review to make clear that at the very least, *Barnes* and *Pap's* are limited to actual conduct in public, and cannot be extended to representations of nudity – whether on cable, on broadcast television, in films, or in photographs.

Petitioner was not convicted for the act of being nude or appearing nude in a public place. Neither private nudity nor the filming thereof is illegal under Mich. Comp. Laws § 750.335a (2000). Pet. App. 8a (noting that the "taping did

not constitute the 'exposure'" for which defendant was convicted; the criminal offense was causing the tape to be delivered for broadcast). Petitioner was convicted rather for causing his comedy skit to be shown on cable television. In other words, Petitioner was convicted for the content of his cable television program – an inherently expressive medium. His filming, producing, and acting in a non-obscene comedy skit that contained nudity would not have been illegal *but for* its having been shown on cable television.[5]

The Michigan Court of Appeals nevertheless concluded that Petitioner's conviction was subject to intermediate scrutiny under *O'Brien* because "defendant would have been properly subject to conviction for indecent exposure had he staged the Dick Smart segment in a traditional public square. He becomes entitled to no greater First Amendment protection, and cannot inoculate himself against criminal liability, by channeling his exposure through a cable television network." Pet. App. 14a.

The state court's mistaken leap of logic was fueled in part by the confusion stemming from this Court's nude dancing cases. The Michigan court relied on *Barnes* for the proposition that Petitioner was convicted for the act of being nude, not engaging in expression containing nudity. In *Barnes*, the plurality reasoned that "[p]ublic nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity." 501 U.S. at 571 (plurality); *see also Pap's*, 529 U.S. at 301 ("The ordinance regulates conduct, and any incidental impact on the expressive element of nude

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[5] Petitioner's conviction did not depend upon whether he exposed his own genitals; he would have been equally guilty of violating the statute if the nude images featured in his program had exposed "the person of another." Mich. Comp. Laws § 730.335a (2000). The jury was in fact instructed that it could also convict Petitioner if the cable program at issue exposed the genitals "of another." Trial Tr. at 145-46.

dancing is *de minimis*"). Following this rationale, the Michigan court held that "[s]imilarly, 'the 'perceived evil' that Michigan seeks to address through its indecent exposure statute is not the communication of some message associated with indecent exposure; it is the indecent exposure itself." Pet. App. 11a. The court also echoed the *Barnes* plurality's reasoning in declaring "Michigan's indecent exposure statute does not prevent the conveyance of any message. It merely requires that messages must be conveyed within minimal bounds of proscribed conduct having nothing to do with expression." *Id.*; *see Barnes*, 501 U.S. at 571 (plurality); *see also Pap's*, 529 U.S. at 301 (plurality).

The Court's nude dancing decisions cannot be expanded in this manner without undermining significant First Amendment principles. Under the Court of Appeals' approach, it would be possible to recast all filmed or photographed works as involving the "conduct" of the actors involved, and to treat the distribution of such works as making that conduct "public."[6] That cannot be the law. Indeed, such a conclusion is directly contrary to the Court's review of "indecent" cable programming as "involv[ing] speech alone." *Playboy*, 529 U.S. at 814. Nothing in *Barnes* or *Pap's* indicates that the Court would approve the application of public nudity statutes to television images – or magazines or movies or photographs, for that matter. To the contrary, in *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975), the Court emphasized the constitutional distinction between public nudity and representations of nudity shown in public:

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[6] *Cf. Jenkins v. Georgia*, 418 U.S. 153, 156 n.2 & 161 (1972) (reversing movie theatre manager's conviction under obscenity statute; defendant had also been charged under statute making it a "crime to exhibit a motion picture portraying acts which would constitute 'public indecency' . . . if performed in a public place").

> Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as part of the whole work . . . . [i]n this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws.

Id. at 211 n.7 (citations omitted); *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66 (1981) ("[A]n entertainment program [may not] be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment.") (internal citations omitted); *Barnes*, 501 U.S. at 587 (Souter, J., concurring in the judgment) (noting that Indiana's public nudity statute did not prohibit the dancer or her employer "from expressing an erotic message by articulate speech or representational means").

As a matter of common sense, Petitioner's "Dick Smart" segment is speech, not conduct. However low-brow, the "Dick Smart" segment is no different from any other television show or film that expresses ideas through sight, sound and creativity. The Court has consistently held that the First Amendment applies with full force to this type of entertainment. The Michigan court departed from this well-settled law when it refused to apply meaningful scrutiny to Petitioner's conviction.

In addition to equating pure speech with conduct, the Court of Appeals bolstered its application of *O'Brien* by observing that Michigan's public indecency law is a content-neutral regulation. Pet. App. 13a-14a. The court held that, because the indecent exposure statute did not prohibit protected speech on its face, any application need only survive intermediate scrutiny as a content-neutral restriction. At least on their face, statements in the plurality opinions in *Barnes* and *Pap's* arguably support this proposition. *See,*

e.g., Pap's, 529 U.S. at 298 ("Erie's ordinance is on its face a content-neutral restriction that regulates conduct, not First Amendment expression"); *Barnes*, 501 U.S. at 566; *see also id.* at 572 (Scalia, J., concurring) ("On its face, this law is not directed at expression in particular").

Recently, however, members of this Court have emphasized that content-neutrality is "something of a fiction," and, accordingly, "content based" or "content neutral" statutory text are at best imprecise markers for the requisite level of scrutiny. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444-45, 448 (2002) (Kennedy, J., concurring); *id.* at 455 (Souter, J., dissenting). This case presents in stark terms the issue of whether facial neutrality can insulate a law from stringent First Amendment scrutiny when it is applied to criminalize the core expressive content of speech. As interpreted by the Michigan Court of Appeals, the indecent exposure law outlaws any public exhibition of media that contains "offensive" nudity. That application would appear to be the paradigm of content-based censorship.

The Court of Appeals also cited *Barnes* for the proposition that the government's interest in protecting "morality" – without any showing of "secondary effects" – is sufficient justification for imposing criminal penalties on Petitioner. Pet. App. 11a-13a. But "protecting morality" by prohibiting speech that causes "offense" targets the *primary* effects of expression, and strict scrutiny therefore applies. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality) ("The emotive impact of speech on its audience is not a 'secondary effect'"); *Playboy*, 529 U.S. at 811-12. In recent cases, moreover, this Court has indicated that targeting secondary effects – rather than the immorality or offensiveness of the speech itself – is a necessary prerequisite for application of intermediate scrutiny. *Alameda Books*, 535

U.S. at 449-50 (Kennedy, J., concurring) (to warrant intermediate scrutiny, "[t]he rationale of the ordinance *must* be that it will suppress secondary effects – and not by suppressing speech"); *see also Playboy*, 529 U.S. at 815 ("the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech"). To the extent that the plurality opinion in *Barnes* continues to provide a refuge for speech restrictions based on a moral code, the Court should make clear that the idea of promoting public morality by suppressing indecent *speech* is fundamentally at odds with the First Amendment.[7]

B. The Decision Below Perpetuates Confusion About The Level Of Scrutiny Applicable To Indecent Cable Programming.

This Court's cases indicate that cable programming should receive full First Amendment protection. The Court has applied searching constitutional review to government attempts to restrict "indecent" material on cable. *See Playboy*, 529 U.S. at 814; *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 756 (1996). In *Playboy*, the Court held that a statute requiring cable operators to scramble or time-restrict sexually oriented cable channels imposed a content-based burden on speech that triggered, and failed, strict scrutiny. 529 U.S. at 814. And in *Denver Area*, the Court struck down a requirement that cable operators restrict "patently offensive" material on leased channels because the statute did not "reveal the caution and care" of "laws that seek to reconcile the critically important

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[7] In recent years, moreover, the notion that preserving a moral code provides a legitimate governmental interest for restricting constitutional rights has been called into serious doubt. *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions." 518 U.S. at 756.

Rejecting the strict scrutiny applied in *Playboy*, the Michigan Court of Appeals instead cited *Pacifica* for the proposition that "broadcasting . . . has 'the most limited First Amendment protection,'" and concluded that the government's interest in protecting adults from offensive materials in their home justified Petitioner's conviction without any showing of compelling interest or narrow tailoring. Pet. App. 14a (quoting *Pacifica*, 438 U.S. at 748). The court held that *Pacifica* "applies to cable television broadcasting," citing as support the plurality opinion in *Denver Area*. *Id.*

The Michigan court's holding below reflects confusion in this Court's own cases concerning the extent to which the constitutional treatment afforded cable television differs or overlaps with that afforded the traditional broadcast medium. *Compare Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation"), *with Denver Area*, 518 U.S. at 748 (plurality) (with respect to the effect of programming on children, "cable and broadcast television differ little, if at all"). Some statements suggest that the government's interest in protecting children from "indecent" or "offensive" programming may be the same for both types of media. *Denver Area*, 518 U.S. at 744 (plurality); *id.* at 771-72 (Stevens, J., concurring); *id.* at 776 (Souter, J., concurring); *id.* at 804 (Kennedy, J., concurring). But the Court's decisions also reflect a recognition that cable and traditional broadcast television differ in ways that may well result in less

tolerance for governmental restrictions in the cable medium than has been allowed in the area of broadcast.[8]

Most recently, in *Playboy*, a majority of the Court explicitly refused to apply the lower level of review employed in *Pacifica* to the cable medium. *Playboy*, 529 U.S. at 814. Indeed, while acknowledging that "[c]able television, like broadcast media, presents unique problems . . . which may justify restrictions that would be unacceptable in other contexts," *id.* at 813, the Court in *Playboy* emphatically stated that the standard for evaluating content-based restrictions on "indecent" cable programming is "clear: The standard is strict scrutiny." *Id.* at 814. Thus, the Michigan court's refusal to apply strict scrutiny directly conflicts with this Court's decision in *Playboy*.[9] And that error was clearly outcome determinative, as the application

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[8] One "key difference" between cable and broadcast television is that "[c]able systems have the capacity to block unwanted channels on a household-by-household basis," which "reduces the likelihood, so concerning to the court in *Pacifica* . . . that traditional First Amendment scrutiny would deprive the Government of all authority" to address the problem of minors' access to indecent material. *Playboy*, 529 U.S. at 815. The Court has also acknowledged the development of technologies that allow cable users to selectively block indecent material. *See Denver Area*, 518 U.S. at 756-57. As the Court made clear in *Playboy*, the government cannot ban indecent cable programming if the less restrictive measure of targeted blocking is a feasible and effective means of furthering the government's interests. *Playboy*, 529 U.S. at 815.

[9] The Michigan Court of Appeals' application of *Pacifica* to cable television also conflicts directly with several federal court decisions striking down restrictions on indecent cable television programming. *See, e.g., Cruz v. Ferre*, 755 F.2d 1415, 1420-21 (11th Cir. 1985) (*Pacifica* inapplicable to cable because it "does not 'intrude' into the home" in the way broadcast television does); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1113-14 (D. Utah 1985) (same), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1168-70 (D. Utah 1982) (same).

of Michigan's indecent exposure statute to this cablecast plainly cannot survive strict scrutiny. Thus, even if plenary review by the Court of the First Amendment issues in this case were not appropriate, Petitioner's criminal conviction should be summarily reversed on this ground alone.

In any event, the Michigan Court of Appeal's holding goes far beyond what even *Pacifica* approved, and the Court's review is necessary to clarify that an interest in protecting adult viewers from "offense" is not a constitutionally permissible basis for imposing a total ban on "indecent" programming. Unlike the criminal ban here, *Pacifica* upheld the FCC's authority to regulate the time period during which broadcasters are permitted to air "indecent" material, based on the government's interest in protecting children. *See* 438 U.S. at 757 ("Commission sought to 'channel' the monologue to hours when the fewest unsupervised children would be exposed to it") (Powell, J., concurring in part and concurring in judgment). This Court has since repeatedly distinguished between the time regulation approved in *Pacifica* and a total ban on indecent material. *See Reno*, 521 U.S. at 867; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989).

Here, the Court of Appeals affirmed Petitioner's conviction despite the fact that his program was televised at 10:30 p.m. – within the "safe harbor" established by the FCC for broadcast – and without any evidence that children viewed or were at risk of viewing the program. Indeed, nothing in the Court of Appeals' decision turned on an interest in protecting minors from exposure to "indecent" material – the sole interest that this Court has held may justify restrictions on non-obscene material transmitted by broadcast or cable television or the Internet, provided the regulations do not unduly burden adult speech. *See Playboy*, 529 U.S. at 811; *Reno*, 521 U.S. at 875; *Denver Area*, 518

U.S. at 743; *Pacifica*, 428 U.S. at 749-50. To the contrary, Petitioner was convicted because another *adult* viewer was offended by what she saw. Pet. App. 4a; Trial Tr. at 23-25. And by its plain terms the Michigan court's decision applies to all nudity that any adult might find offensive, no matter the time of the day. Pet. App. 6a. Thus, even if *Pacifica* could properly be applied to cable television – a conclusion this Court has declined to adopt, *see Playboy*, 529 U.S. at 815 – it provides no support for the Michigan Court of Appeals' decision here.

C. Application Of State Public Nudity Statutes To Cable Programming Will Have Sweeping Effect.

Immediate review by this Court is urgently required in light of the sweeping chilling effect the decision below will have if not reversed. The interpretation employed by the Michigan Court of Appeals would apply to *any* depiction of nudity on cable that any viewer might deem "offensive." Indeed, the court's logic would extend to movies, magazines and other traditional media of protected speech. Given the boundless nature of the Michigan court's ruling, the consequences of the decision are troubling and far-reaching.

The chilling effect of the Michigan court's decision is undeniable. *See Reno*, 521 U.S. at 871-72 (expressing concern regarding the chilling effect of a criminal sanction on speech); *Ashcroft v. ACLU*, 542 U.S. 656, 660, 667 (2004). Preventing the appearance of nude images that might cause "offense" to cable television viewers is precisely the justification for Petitioner's conviction under the statute. And violation of the indecent exposure statute today can result in up to one year in prison or a fine of up to $1,000 or both. Mich. Comp. Laws § 750.335a (2006). Given the sweeping scope of the Michigan court's ruling, and the uncertainty about what kind of nude images would cause "offense," it is virtually certain that public access cable

programmers, and cable programmers in general, will be deterred from televising cable programs containing nudity. And because the rationale of the Michigan court, if left uncorrected, could be used by prosecutors in every state with a public nudity law to restrict nudity or indecency on cable television and other First Amendment media, the effects of Petitioner's conviction are potentially widespread.

The burden is not limited to the "Dick Smarts" of cable television. Under the Michigan court's rationale, the public indecency statute would conceivably extend to programming such as HBO's *The Sopranos*, or the televising of *Schindler's List*, *A Room With A View*, *The Talented Mr. Ripley*, or any other number of movies showing nudity on cable television or, indeed, through any other medium. It would prohibit the broadcast of Richard Strauss's "Dance of the Seven Veils" from the opera Salome, "everyone's favorite example of constitutionally protected striptease," *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1094 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and would prohibit many graphic science programs. *See Denver Area*, 518 U.S. at 805 (Kennedy, J., concurring) ("Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power"). If allowed to stand, the Michigan court's rationale could be used to ban the display of a whole host of visual representations of nudity that some may find offensive.

Petitioner's conviction has important and long-lasting consequences for him personally, and for anyone else to whom the public indecency statute is applied for making programming containing nudity available to the public. This Court has repeatedly recognized the "opprobrium and stigma of a criminal conviction." *Reno*, 521 U.S. at 872; *see also In re Winship*, 397 U.S. 358, 363-64 (1970); *Lewis v. United*

States, 518 U.S. 322, 334 (1996) (Kennedy, J., concurring in judgment). "A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. . . . And once the period of custody is over, the fact of the arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting). Under certain circumstances, conviction under the State's indecent exposure statute could have even more severe consequences, including life imprisonment, *see* Mich. Comp. Laws § 750.335a(2)(c) (2006), and requiring registration as a sex offender under Mich. Comp. Laws § 28.722 *et seq*.

That the televising of an opera, a critically-acclaimed movie, or a bawdy stand-up comedy routine on cable television could result in the actor or even cable programmer spending a year or more in prison shatters the protections of the First Amendment.

II. Alternatively, The Court Should Summarily Reverse On Due Process Grounds Because The Law Did Not Give "Fair Warning" That It Could Be Applied In This Way.

Even apart from these First Amendment questions, Petitioner's conviction is inconsistent with this Court's "fair warning" precedents. If the Court does not accept full review of the case on the merits, it should at a minimum summarily reverse on the merits. But if the Court does engage in plenary review, it should grant the second question presented as well.

The Due Process Clause requires that a criminal statute give fair warning of the conduct it criminalizes so that "no man [is] held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Bouie*, 378 U.S. at 351. This fair warning principle not only prohibits the enforcement of a criminal statute "so vague that

men of common intelligence must necessarily guess at its meaning and differ as to its application," but also "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quotation marks omitted). The "touchstone" of fair warning is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267. As this Court has repeatedly made clear, the standard for determining whether a criminal law provides fair warning is "the same as the standard for determining whether a constitutional right was 'clearly established' in civil litigation under [42 U.S.C.] § 1983." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002) (citing *Lanier*, 520 U.S. at 270-71).

The Michigan Court of Appeals clearly violated the fair warning requirement by applying to Petitioner an unprecedented and unforeseeable construction of Michigan's indecent exposure statute. As the court acknowledged, the "application of [the Michigan indecent exposure] statute or, indeed, any indecent exposure statute, to television or film images is *unprecedented*." Pet. App. 5a (emphasis added). Nationally, past convictions for indecent exposure appear to be limited to physical exposures. *See* David Minneman, *What Constitutes "Public Place" Within Meaning of State Statute or Local Ordinance Prohibiting Indecency or Commission of Sexual Act in Public Place*, 95 A.L.R.5th 229 (2002) (listing various locations in which indecent exposures have been held to occur).[10] The utter lack of any precedent

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[10] The lack of any prior case applying an indecent exposure statute to a televised image distinguishes this case from *Rose v. Locke*, 423 U.S. 48 (1975), where the Court held that Tennessee's "crime against nature" statute gave fair warning that it applied to cunnilingus, because "[o]ther jurisdictions had already reasonably construed identical statutory

even suggesting that a public indecency statute could be applied to televised nudity made it far from "clearly established" that Petitioner's conduct was criminal.

The Court of Appeal's application of the indecent exposure statute to cable programming was not only unprecedented, but also unforeseeable, in light of prior Michigan court rulings limiting the statute's scope to conduct occurring in a public place. In *People v. Vronko*, 579 N.W.2d 138 (Mich. Ct. App. 1998), the court upheld the defendant's indecent exposure conviction for revealing his genitalia and masturbating while seated in a parked car on a public street. In reaching this result, the court interpreted the statute to apply "in a public place," either in the actual presence of another person or "under circumstances in which another person might reasonably be expected to observe [the exposure]." *Id.* at 142. The court noted that at common law, an indecent exposure had to occur "in a public place," and that "nothing in the language of the statute suggests that the Legislature intended to modify the common-law interpretation." *Id.* Earlier Michigan cases applied the statute only when the exposure occurred in a public place. *See People v. Wilson*, 291 N.W.2d 73 (Mich. Ct. App. 1980) (defendant masturbated on stage in front of a live audience); *People v De Vine*, 261 N.W. 101, 102 (Mich. 1935) (defendant exposed himself on his front porch, which was frequented by children of neighboring families); *People v. Ring*, 255 N.W. 373, 374-75 (Mich. 1934) (defendant exposed himself in a nudist colony); *People v. Katz*, 203 N.W. 114, 115 (Mich. 1925) (defendant exposed himself in a vacant lot while calling to children across the street).

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language to apply to [cunnilingus]." *Id.* at 53; *see also id.* at 50 ("Anyone who cared to do so could certainly determine what particular acts have been considered crimes against nature, and there can be no contention that the respondent's acts were ones never before considered as such").

Under *Vronko* and its predecessors, it was far from clearly established that televised nudity could be punished under Michigan's public indecency statute. Petitioner thus could not have foreseen that he could he held criminally liable for arranging for his program to be sent to GRTV for broadcast on cable television. The record is devoid of any evidence even suggesting that Petitioner was in a public place when he arranged to send the film to GRTV, and the broadcast itself cannot plausibly qualify as a "place," much less a "public place," under *Vronko*.[11] The Court of Appeals greatly enlarged the scope of the statute by applying it not only to physical locations but also to televised images. "Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating." *Rabe v. Washington*, 405 U.S. 313, 315 (1972) (per curiam).[12]

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[11] *See* The Compact Oxford English Dictionary 1353 at 937-38 (2d ed. 1991) (defining "place" as an "[o]pen space in a city; a square; a market place;" "[a] material space;" "[a] particular part of space, of defined or undefined extent, but of definite situation;" "[t]he portion of space actually occupied by a person or thing;" "a piece or plot of land;" "[a] portion of space in which people dwell together;" "[a] residence, dwelling, house; a seat, mansion, palace;" or "[a] building, apartment or spot devoted to a specified purpose").

[12] Thus, the Court of Appeals' decision "upset" the earlier, narrower construction of the statute in *Vronko*. *See Marks v. United States*, 430 U.S. 188, 195 (1977) (broad reading of obscenity statute was unforeseeable because it upset a previously established narrower construction); *see also Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (interpretation of "arrest" to include a traffic citation was unforeseeable because it conflicted with the narrower definition of "arrest" in the parole revocation statute); *Bouie*, 378 U.S. at 350 (reversing criminal trespass convictions because state court's construction of criminal trespass statute was unforeseeable in light of the narrow statutory text).

Further, Petitioner's broadcast took place against a backdrop of decisions from this Court applying searching scrutiny to restrictions on "indecent" expression on cable and the Internet. *See Denver Area*, 518 U.S. at 756; *Reno*, 521 U.S. at 867; *see also Playboy*, 529 U.S. at 814. Nothing in this Court's decisions would have led Petitioner to believe that he could be prosecuted and convicted under a public conduct statute for arranging for the cablecast of his program. To the contrary, if anything, Petitioner would have reasonably believed that well-established First Amendment principles protected cable programs containing controversial or even offensive speech, provided it was not obscene.

The violation of fair warning in this case is materially indistinguishable from the one at issue in *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam). There, the petitioner had been convicted of violating a Washington obscenity statute prohibiting the knowing display of obscene motion pictures. In affirming the conviction, the Washington Supreme Court held that even though the film at issue was not itself obscene and thus could lawfully be displayed at an indoor theatre, it was obscene when shown at a drive-in theatre. This Court overturned the conviction because the Washington Supreme Court's broadening of the statute was unexpected: it did not give the petitioner fair notice that criminal liability was dependent upon the place where the film was shown. *Id.* at 315-16 (relying on *Cohen v. California*, 403 U.S. 15, 19 (1971), in which the Court held that California's statute prohibiting disturbances of the peace did not provide the petitioner fair notice that certain kinds of otherwise permissible speech were impermissible when uttered in a courthouse). This case is no different. The Michigan Court of Appeals' broadening of the statute to include televised images was similarly unexpected. Petitioner had no way to anticipate that a statute prohibiting exposures in a public place would be extended to his cable

television program. Just as in *Rabe*, summary reversal is warranted to correct the state court's grave violation of due process.

In short, by no stretch of the imagination did either the public indecency statute itself, or court decisions interpreting it, clearly establish that the statute proscribes offensive nudity in a cable program. Petitioner's conviction patently violates the fair warning requirement under this Court's cases. And the Court has not hesitated to summarily reverse state court criminal convictions in analogous situations. *See Lanier v. South Carolina*, 474 U.S. 25 (1985) (per curiam) (summarily reversing conviction as contrary to Supreme Court's Fourth Amendment search and seizure jurisprudence); *Payne v. Virginia*, 468 U.S. 1062 (1984) (per curiam) (summarily reversing conviction as contrary to Supreme Court's Double Jeopardy Clause jurisprudence); *Rabe*, 405 U.S. at 316 (summarily reversing state court obscenity conviction as contrary to Supreme Court's fair warning jurisprudence); *see also Douglas*, 412 U.S. at 432 (summarily reversing state court's revocation of parole as contrary to Supreme Court's fair warning jurisprudence).[13] Summary reversal is particularly warranted here in light of the important First Amendment interests at stake. *See Marks*, 430 U.S. at 196 ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values"); *Rose*, 423 U.S. at 50 n.3 (fair warning case noting that "special judicial scrutiny" is called for when "the statute threatens a fundamental right such as freedom of speech").

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[13] *See also* Robert L. Stern, *et al.*, *Supreme Court Practice* 323 (8th ed. 2002) (the Supreme Court "has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous").

CONCLUSION

The petition for a writ of certiorari should be granted and the case set down for plenary hearing on the merits or, alternatively, the conviction should be summarily reversed.

Respectfully submitted,

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